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No. _____

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In the Supreme Court of the United States

OCTOBER TERM, 1980

THE STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment bar retrial of a criminal defendant when a mistrial is granted on the defendant's motion based upon a prosecutor's improperly phrased question, which is prejudicial to the defendant, but is asked in good faith and without the intent to provoke a mistrial?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

Petitioner, the State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on November 24, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing defendant's conviction (Appendix A) is reported at 49 Or. App. 415, 619 P.2d 948 (1980). The order of the Supreme Court of the State of Oregon denying the state's petition for review of the Court of Appeals' decision (Appendix B) is reported, officially only, at 290 Or. 551 (1981).

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on November 24, 1980. The Supreme Court of Oregon denied a timely petition for discretionary review on March 4, 1981; and this petition for a writ of certiorari was filed within 60 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

United States Constitution, Amendment XIV, § 1:

". . . [N]or shall any state deprive any person of life, liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

The defendant was charged by indictment with theft in the first degree. The trial began on February 27, 1980 before Circuit Judge Phillip Roth. A jury was impaneled, opening statements were made, and the state called two brief witnesses. (Tr. 1-21). Following this, the state called Otto Ewaldsen, an expert on Middle Eastern rugs, who described the rug in question to the jury and estimated its approximate value. (Tr. 28, 32). This concluded the state's direct examination of Mr. Ewaldsen. The defendant's attorney began his cross examination by asking the witness about his bias toward the victim. (Tr. 32-33). The attorney then asked the witness the following series of questions:

Q: [Mr. Elliott]: "Mr. Ewaldsen, did you not file or try to file a complaint with the district attorney's office in Medford, Oregon against Mr. Kennedy a number of years ago because he was a competitor of yours down there?

A: [Mr. Ewaldsen]: "No, I did not. Against Mr. Kennedy?

Q: "Did you file against Mr. or Mrs. Kennedy or their business venture down there?

A: "No, I did not file. I caused an inquiry to be started.

Q: "Well, did you file a complaint with the district attorney's office down there in which you charged them with fraudulent advertising?
A: "I believe we did. It's been a long time ago.
(Counsel approached the witness.)
Q: "Is that your handwriting?
A: "Yes, and it's my signature and since you've introduced this, I would like an opportunity to explain it.
Q: "Well, you —
A: "In other words, the whole document —
[THE COURT]: "Just a minute. He'll handle the questions, you handle the answers.
Q: [Mr. Elliott]: "Mr. Ewaldsen, after you went to the district attorney's office and filed this complaint against Mr. and Mrs. Kennedy or their business, nothing came of it, did it?
A: "No. I never met Mr. Kennedy. I didn't know — I mean, I never met him.
Q: "I didn't ask you whether you met him, Mr. Ewaldsen. I asked whether or not anything came of your complaint filed with the district attorney's office down there?
A: "The district attorney did not pursue it." (Tr 34-35).

Later during redirect examination the prosecutor unsuccessfully attempted to ask the witness why he had filed a complaint against the defendant. The trial court sustained a series of objections by defense attorney to this line of questioning.[1] (Tr. 62-63, 64, 65, 66). The prosecutor then asked:

[1]The Court of Appeals opinion states that the objections by defense counsel ". . . were not well taken, and the judge's rulings were probably wrong. . .". 49 Or. App. at 417.

Q: [Ms. Johnson]: "Have you ever done business with the Kennedys?

A: "No, I have not.

Q: "Is that because he is a crook? (Tr. 67)."

The defense attorney objected to the question, and requested a mistrial. The prosecutor objected to the mistrial, but the court ruled that the question was highly prejudicial to the defendant and granted the defense motion. (Tr. 68-70). The court commented that the prosecutor should have asked the witness, "Why did you not do business with Mr. Kennedy?" (Tr. 71). At the time of the motion to dismiss, Ms. Johnson testified that she did not ask the question to cause a mistrial. (Motion Transcript, p.1).[2] Ms. Johnson thought the question was relevant because the defense attorney brought up the subject matter on cross examination. (M Tr. 12). The witness had previously told Ms. Johnson that the defendant was not "honest or honest in his business dealings . . ." and that is what prompted the question. She acknowledged that the form of the question was improper. (M Tr. 12). Ms. Johnson noted that the state vigorously objected to the mistrial. After Judge Roth left the bench she went into his chambers and asked him to reconsider his ruling. (M Tr. 19).

[2]Hereinafter the Motion Transcript will be referred to as "M Tr."

The Motion to dismiss was heard before Judge John T. Murchison, who made the following findings:

> "The issue before the Court is whether or not the conduct in this matter was intentional, overreaching or in bad faith, and as the Court has reviewed the portion of the transcript which you have attached to your motion and has listened to your explanation of the circumstances of how this matter arose, it seems apparent that the objectionable statement was made in the course of an attempt to clarify matters which had been brought out on cross-examination, and this, of course, is a proper function of redirect examination.
>
> "I have reviewed the transcript and the wording, as put, and I would agree that the question was improper as put. I do not find, however, that it constitutes bad faith or was intentional impropriety. The question of whether or not it constitutes overreaching is one of those gray areas where we have to determine what "overreaching" means, and in looking to the case which the defense has cited, *United States vs. Kessler,* prosecutorial overreaching is there defined as being such as must have been a result of gross negligence or intentional misconduct which prejudiced the defendant so that he cannot receive a fair trial, and I wouldn't find that the overreaching or the erroneous conduct in this matter reaches that degree of aggravation. I don't think it amounted to gross negligence or intentional misconduct." (M Tr. 22-23).

REASONS FOR GRANTING THE WRIT

A. THE OREGON COURT OF APPEALS HAS ESTABLISHED THE LOWEST STANDARD EVER DECLARED BY AN APPELLATE COURT TO DETERMINE WHAT CONSTITUTES PROSE-

CUTORIAL MISCONDUCT WHICH BARS RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

The opinion of the Oregon Court of Appeals accepts the trial court's finding that the prosecutor did not intend to cause a mistrial;[3] however, the opinion nonetheless concludes that overreaching occurred because the prosecutor intentionally asked the question. The opinion also suggests that the subjective intent of the prosecutor should not play a pivotal role in deciding double jeopardy claims,[4] a suggestion which is inconsistent with the historical genesis of the Double Jeopardy Clause and the opinions of this Court.

In *United States v. Dinitz,* 424 U.S. 600, 96 S. Ct. 1075, 47 L.Ed.2d 267 (1976), this Court held that:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendant to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor' [citing *United States v. Jorn,* 400 U.S. 470, 485, 27 L.Ed.2d 543, 91 S. Ct. 547] threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." 424 U.S. at 611.

[3]The trial court also found as a matter of fact that the question did not constitute gross negligence under the circumstances in which it was asked.

[4]See Footnote 1 at 49 Or. App. 418.

In *Tabbs v. State,* 403 A.2d 796 (Maryland 1979), Judge Charles E. Moylan in a thorough discussion of the double jeopardy clause, summarized its historical background:

> "There was . . . an independent common law tradition, dating from early Stuart times, protecting a defendant from having his trial needlessly aborted by the crown when a prosecutor or a sympathetic judge sensed that the trial was going badly for the state. A defendant was protected from a retrial when the state . . . deliberately aborted the first trial in order to obtain hopefully more favorable conditions at a subsequent trial." 403 A.2d at 798.

In *Tabbs,* following an extensive review of the double jeopardy decisions of this Court, Judge Moylan concluded that jeopardy will only attach if the conduct by the prosecutor was done with the intent to cause a mistrial in order to gain a better forum, or in a bad faith effort to subject the defendant to multiple prosecutions.

> "* * * Without intimating even remotely that there was any negligence, gross or otherwise, we do not find it necessary to assess the facts in this regard because of our holding that negligent trial error (even gross) is not a variety of judicial or prosecutorial overreaching.
>
> "We deliberately choose this approach to the case because it is of broader precedential significance and because it may serve to lay to rest the ghost of gross negligence which is being raised with increasing and with alarming frequency in

the appeals brought to this Court. At the risk of piling Ossa upon Pelion, we attack what we deem to be this misbegotten notion on a number of fronts in the hope that the issue may be settled once and for all, definitively, exhaustively even if exhaustingly." 403 A.2d at 801.

In the present case, the opinion of the Oregon Court of Appeals has departed from the historical purpose of the Double Jeopardy Clause protection and has misinterpreted the decisions of this Court applying that protection to cases of alleged prosecutorial misconduct.

B. THERE IS CONFLICT AMONG VARIOUS FEDERAL AND STATE JURISDICTIONS IN THEIR INTERPRETATIONS OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AS APPLIED TO CASES OF ALLEGED PROSECUTORIAL MISCONDUCT.

When the defendant successfully moves for a mistrial, the Double Jeopardy Clause does not bar reprosecution "even if defendant's motion is necessitated by a prosecutorial or judicial error." *United States v. Jorn,* 400 U.S. 470, 485, 91 S. Ct. 547, 27 L.Ed2d 543 (1970). However, retrial is barred where the error that prompted the mistrial is intended to cause a mistrial or is intended to harass the defendant. *United States v. Dinitz, supra. United States v. Scott,* 437 U.S. 82, 94, 57 L.Ed.2d 65, 98 S. Ct. 2187 (1978).

Subsequent to *Jorn,* and *Dinitz,* a split of authority arose respecting what constitutes prosecutorial over-

reaching. The majority of the cases hold that the overreaching must be with the intent either to provoke a mistrial in order to obtain hopefully more favorable conditions at a subsequent trial or to harass a defendant by successive, prolonged litigation. *People v. Gomez,* 406 N.E.2d 886 (Ill. 1980), *United States v. Calderon,* 610 F.2d 88 (9th Cir., 1980), *Tabbs v. State,* 403 A.2d 796 (Maryland 1979), *Commonwealth v. Meekins,* 403 A.2d 591 (Pa. 1979), *People v. Baca,* 562 P.2d 411 (Col. 1979), *State v. Baylor,* 587 P.2d 343 (Kan. 1978), *People v. Hathcock,* 504 P.2d 476 (Cal. 1973), *Muller v. State,* 478 P.2d 822 (Alaska 1971). Consistent with this majority view is the most recent case from the Ninth Circuit, *United States v. Roberts,* 640 F.2d 225 (9th Cir. 1981). There the prosecutor committed reversible error when he attempted to bolster the credibility of the chief prosecution witness with evidence outside the record after an objection was sustained by the trial court. The Ninth Circuit held that:

> "Although the prosecutor's comments appear to have been intentional and were not harmless, there has been no showing that the comments were deliberately made to provoke a mistrial. . . . Accordingly, we decline to extend the bar on retrial to cases involving gross negligence without the intent to provoke a mistrial." 640 F.2d at 238.

A minority of courts have held that conduct by the prosecutor, although not intentional, may be over-

reaching if it amounts to *gross* negligence. This view appears to have its beginnings in *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976). However, even that Circuit has focused on the intent of the prosecutor and seems to have effectively repudiated or limited *Kessler* in later cases. In *United States v. Garza,* 603 F.2d 578 (5th Cir. 1979), the prosecutor made an improper reference before the jury to a matter which the court previously had ruled on, laughed during the cross examination of a state's witness, and called a witness after being told that the witness would exercise his Fifth Amendment rights. The court found the prosecutor's conduct to be "improper and prejudicial to the defendant," however, because the court could not say with assurance that the prosecutor's conduct was "motivated by bad faith," the court denied defendant's jeopardy claim on the grounds that the conduct was not intentional or grossly negligent.

The opinion of the Oregon Court of Appeals goes beyond *both* lines of cases by holding that the single question by the prosecutor, which the trial court found to be no more than mere negligence, was overreaching. This opinion thus creates yet a third standard, which has never been sanctioned by this Court.

CONCLUSION

The decision of the Oregon Court of Appeals incorrectly interpreted the Double Jeopardy Clause of the

United States Constitution. For the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,

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baw

Appendix A

No. C-79-12-34399, CA 17729

IN THE COURT OF APPEALS OF THE STATE OF OREGON

State of Oregon,

Respondent,

v.

Bruce Alan Kennedy,

Appellant.

Appeal from Circuit Court, Multnomah County. John J. Murchison, Judge.

Argued and submitted October 24, 1980.

Donald C. Walker, Portland, argued the cause and filed the brief for appellant.

John C. Bradley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were James M. Brown, Attorney General, John R. McCulloch, Jr., Solicitor General, and William F. Gary, Deputy Solicitor General, Salem.

Before Gillette, Presiding Judge, and Roberts and Campbell, Judges.

GILLETTE, P. J.

Reversed.

XKEN Filed: November 24, 1980

GILLETTE, P. J.

This is a criminal case in which the defendant's sole assignment of error is the trial court's failure to

dismiss the case against him based upon a theory of prior jeopardy. We reverse.

Defendant was charged with the theft of an oriental rug. At his first trial, one of the principal witnesses against him was a Mr. Ewaldsen, whose testimony was crucial to the prosecution's case in that it provided proof of both the value and the identity of the rug in question.

On cross-examination, the defense attorney immediately attempted to establish bias on the part of the witness by asking him is he had filed a "complaint" against the defendant with the District Attorney's office in Medford. The witness first denied doing so, but then acknowledged that he had filed a complaint charging the defendant with fraudulent advertising. Without objection by the prosecution, it was further established that the District Attorney's office had taken no formal action as a result of the complaint.

Later, during redirect examination, the prosecutor unsuccessfully attempted to ask the witness why he had filed a complaint against the defendant. The trial judge sustained a series of objections by the defense to this line of inquiry. The objections were not well taken, and the judge's rulings were probably wrong, but that is not the issue before us now. The prosecutor then asked:

"Q: (The Prosecutor): Have you ever done business with the Kennedys?

"A: No I have not.
"Q: Is that because he is a crook?"

A mistrial was immediately granted.

When the case came on for retrial, a second judge declined to grant the defendant's motion for dismissal of the charges on the ground of prior jeopardy. The defendant was then tried and convicted.

The general rule is said to be that the double jeopardy clause does not bar reprosecution, "* * * where circumstances develop not attributable to prosecutorial or judicial overreaching, * * * even if defendant's motion is necessitated by a prosecutorial error." *United States v. Jorn,* 400 US 470, 485, 91 S Ct 547, 27 L Ed2d 543 (1970). However, retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is "motivated by bad faith or undertaken to harass or prejudice" the defendant. *United States v. Dinitz,* 424 US 600, 611, 96 S Ct 1075, 47 L Ed2d 267 (1976). Accord, *State v. Rathbun,* 37 Or App 259, 586 P2d 1136 1978), *reversed on other grounds,* 287 Or 421, — P2d —— (1979).

With respect to the first of these alternative criteria, *i.e.,* in intent to cause a mistrial, the trial court found as a matter of fact that it was not the intention of the prosecutor in this case to cause a mistrial. We are bound by this finding of fact. *State v.*

Warner, 284 Or 147, 585 P2d 681 (1978); *Ball v. Gladden,* 250 Or 485, 443 P2d 621 (1968).[1]

However, we are of the opinion that the prosecutor's conduct in this case meets one of the other forbidden criteria, *viz.,* overreaching. The comment occurred during the redirect examination of a key witness. The prosecutor's express intent was to rehabilitate the witness, who had been impeached. However, the commenting question went beyond rehabilitation and was, in fact, a direct personal attack on the general character of the defendant. As such, we think the prosecutor is charged with the knowledge that the comment—which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought—was certain to interfere with the trial process. Defendant then was faced with a Hobson's choice—either to accept a necessarily prejudiced jury, or to move for a mistrial and face the process of being retried at a later time. There will be many circumstances in which the decision, in the face of this dilemma, to seek a mistrial will be deemed the equivalent of a waiver of a defendant's prior jeopardy rights. *See United States v. Jorn, supra,* 400 US at 485. However, this case of flagrant overreaching lies out-

[1]The trial court's conclusion was based upon its acceptance of the sworn testimony of the prosecutor, who called herself as a witness at the hearing on the motion to dismiss. As the text of our opinion, *post,* indicates, we are not sure that the subjective intent of the prosecutor should necessarily play a pivotal role in the decision as to whether or not prior jeopardy forbids retrial.

side that general rule. The facts require reversal of the defendant's conviction and his discharge on grounds of former jeopardy.

Reversed.

Appendix B

March 4, 1981

John C. Bradley
Assistant Attorney General
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Re: State v. Bruce Alan Kennedy
CA 17729 SC 27521

Dear Mr. Bradley:

The Supreme Court today denied respondent's Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

Marilyn Hartley
Supreme Court Calendar Clerk

MH/np
cc: Donald C. Walker

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